88-932 (1)

NO. _____

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

LARRY D. JACKSON, AS DIRECTOR OF THE DEPARTMENT OF SOCIAL SERVICES OF THE COMMONWEALTH OF VIRGINIA,

AND

GRACE BAPTIST CHURCH, et al., INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED
Petitioners,

v.

FOREST HILLS EARLY LEARNING CENTER, INC., et al.
Respondents.

CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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QUESTION PRESENTED

Did the Court of Appeals err in concluding that respondents have standing to challenge a state statute on Establishment Clause grounds where respondents did not show that they have personally suffered any actual or threatened injury as a result of the statute?

PARTIES

Petitioner Larry D. Jackson, defendant below, is Director of the Department of Social Services of the Commonwealth of Virginia. He is responsible for administration and enforcement of Virginia Code § 63.1-196.3, which exempts church-affiliated child care centers from compulsory licensing required of most (but not all) other child care centers in Virginia.

Petitioners Grace Baptist Church, Tabernacle Baptist Church, Berean Baptist Church and the Rock Church (the "churches") are churches that operate child care centers and that have elected not to be licensed, as permitted by § 63.1-196.3. The churches intervened as defendants pursuant to an invitation of the Court of Appeals in an earlier decision remanding the case to the District Court. *See Forest Hills Early Learning Center, Inc. v. Lukhard*, 728 F.2d 230, 245-47 (4th Cir. 1984). The churches are representatives of a defendant class of religious institutions that operate child-care centers exempted from licensure by § 63.1-196.3

Respondents Forest Hills Early Learning Center, Inc., Academy Day Care, Inc., and Holloman Child Care Centers, Inc., plaintiffs below and petitioners in No. 88-730, are child care centers that are not eligible for licensure exemption under § 63.1-196.3 or otherwise.

Shenandoah Baptist Church and its pastor, Robert L. Alderman, intervened as defendants but were dismissed from the case after they "opted out" of the defendant class. They are not parties to this proceeding.

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OPINIONS BELOW

The opinion at issue is *Forest Hills Early Learning Center, Inc. v. Grace Baptist Church*, 846 F.2d 260 (4th Cir. 1988) ("*Forest Hills IV*"), and is reprinted as Appendix A to this Cross-Petition (App. 1a). The Court of Appeals denied respondents' Petition for Rehearing in an Order reprinted as Appendix E (App. 121a). An earlier opinion of the Court of Appeals addressing the issue of standing is *Forest Hills Early Learning Center, Inc. v. Lukhard*, No. 80-1272 (4th Cir. Jan. 9, 1981) (unpublished) ("*Forest Hills I*"), reprinted as Appendix B (App. 10a). The opinion of the District Court that was reversed by the Court of Appeals in *Forest Hills IV* is reprinted as Appendix C (App. 14a) and reported at 661 F. Supp. 300 (E.D. Va. 1987). The final order of the District Court dismissing the case with prejudice, following the Fourth Circuit's decision in *Forest Hills IV*, is reprinted as Appendix D (App. 120a).

Other reported opinions in this case, listed chronologically, are published at 487 F. Supp. 1378 (E.D. Va. 1980); 540 F. Supp. 1046 (E.D. Va. 1982); 728 F.2d 230 (4th Cir. 1984) ("*Forest Hills II*"); and 789 F.2d 295 (4th Cir. 1986) ("*Forest Hills III*"). A copy of an unpublished judgment of the District Court dated January 17, 1985, has been lodged with the Clerk of the Court.

JURISDICTION

The judgment of the Court of Appeals was entered on May 6, 1988. Respondents' petition for rehearing was denied on August 3, 1988. Respondents' Petition for a Writ of Certiorari was docketed on November 1, 1988, and received on November 2, 1988. *Forest Hills Early Learning Center, Inc., et al. v. Larry D. Jackson, et al.*, No. 88-730. This Cross-Petition is filed in reliance on Rule 19.5 of this Court. This Court has jurisdiction pursuant to 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

Article III, Section 2 of the United States Constitution provides, in pertinent part, "The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution. . . ."

Amendment I of the United States Constitution provides, in pertinent part, "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof."

STATUTE INVOLVED

Virginia Code § 63.1-196.3 is reprinted at App. 44a, as Appendix A to the decision of the District Court dated May 15, 1987, which is reprinted as Appendix C to this Cross-Petition.

STATEMENT OF THE CASE

This is a civil action by three operators of licensed child care centers against the Director of the Virginia Department of Social Services (petitioner Jackson), seeking a declaration that Virginia Code § 63.1-196.3 is unconstitutional and an injunction against its enforcement. Section 63.1-196.3 allows child care centers operated under the auspices of a religious institution, at their option, to be exempt from State licensure, which is required of most (but not all) other child care centers in Virginia.

In *Forest Hills I*, decided in January 1981, the Court of Appeals vacated a judgment dismissing the action for want of standing[1] and remanded for further proceedings. App. 10a. The Court of Appeals noted that plaintiffs "claim only financial harm" and held that "submission of the proffered evidence and the particulars of the secular centers' actual financial loss, if any, would be appropriate before a decision about standing is made." App. 12a.

On remand, plaintiffs filed an Amended Complaint and affidavits designed to show their "actual financial loss" resulting from the statute. They asserted in those papers that they "have suffered competitive injury and continue to suffer competitive injury" as a consequence of the exemption statute. Their contention is that unlicensed status allows churches to operate at lower costs and charge lower fees.

The State again moved to dismiss for lack of standing, and both sides moved for summary judgment. The District Court denied the motion to dismiss but grated the State's motion for summary judgment. *Forest Hills Early Learning Center, Inc. v. Lukhard*, 540 F. Supp. 1046 (E.D. Va. 1982). The Court of Appeals vacated the summary judgment and remanded for further proceedings. *Forest Hills Early Learning Center, Inc. v. Lukhard*, 728 F.2d 230 (4th Cir. 1984) ("*Forest Hills II*"). No question of standing was raised in *Forest Hills II*. *Id.* at 233 n.1.

Following the remand in *Forest Hills II*, the petitioner churches were allowed to intervene as representatives of a defendant class. After further proceedings in both the District Court and the Court of Appeals, trial was held on March 9, 1987.

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[1] *Forest Hills Early Learning Center, Inc. v. Lukhard*, 487 F. Supp. 1378 (E.D. Va. 1980).

Plaintiff-respondents elected to present no evidence that they had been injured by the statute, although they were warned repeatedly in the months preceding trial that petitioner-defendants denied their allegations of injury and would prove the contrary. Respondents presented no evidence, for example, that churches charge lower fees than commercial centers or that families have enrolled children in unlicensed centers because of lower fees, much less that exemption from licensure has allowed churches to lower their fees. As a result, there is simply *no* competent evidence to permit a finding that the statute has had *any* economic impact on plaintiffs.

There is, however, substantial evidence that plaintiffs are not injured by the exemption. As to cost-competitiveness, each of the churches' representatives testified that its child care center is subsidized by the church itself. Scholarships are provided for needy children; facilities, utilities, maintenance and janitorial services are provided; church staff are shared with the child care centers; and direct financial support has come from the churches' general revenues. None of these factors results from the exemption statute. The churches' child care centers, unlike respondents' commercial centers, are not operated for a profit.[2] Moreover, the churches' witnesses testified generally that they comply with all of the State's regulations that they do not oppose on religious grounds, and there has been no contention that any of the objectionable provisions has any effect on costs.

In fact, exemption in some respects entails *higher* costs, as churches are required by the statute to meet more demanding staff-to-child ratios than licensed centers. By accepting the exemption, churches also forego several competitive advantages, including the ability to obtain government subsidies[3] and provider training and to represent to parents that a center is licensed (and thus approved) by the State. Finally, the evidence rather directly refutes respondents' claim that the religious exemption has crippled the commercial centers, as the number of licensed centers in Virginia has increased at a rate almost five times greater

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[2] Respondent Academy Day Care, Inc. is a non-profit corporation.

[3] The limitation of state and federal subsidies to licensed centers appears to have motivated some churches to lobby against the exemption statute and to have led the General Assembly to make exemption optional with the institution.

than that of the pre-school population during the period of the exemption, and twice as rapidly as in the several years preceding its enactment.

On May 15, 1987, the District Court issued an opinion and order declaring the statute unconstitutional and enjoining its enforcement. *Forest Hills Early Learning Center, Inc. v. Lukhard*, 661 F. Supp. 300 (E.D. Va. 1987), reprinted at Appendix C (App. 14a). The District Court held that the issue of plaintiff-respondents' standing had been "resolved in an earlier stage of the proceedings, " in *Forest Hills II*. App. 25a. The District Court recognized that the question of standing was not raised in that appeal, but it reasoned that "that Court would not have been willing to grant summary judgment for the plaintiffs [absent intervention by the defendant class of churches] had the standing issue not been resolved in plaintiffs' favor." App. 26a.

The Court of Appeals held that plaintiff-respondents had standing to sue on a different ground. It held that the "facts and positions of the parties in the present case are closely analogous to those in *Arkansas Writers' Project* [*v. Ragland*, No.85-1370, ____ U.S. ____, 107 S.Ct. 1722 (1987)], and the same principle must govern." App. 5a. The Court of Appeals went on to hold the statute constitutional, applying this Court's decisions in *Lemon v. Kurtzman*, 403 U.S. 602 (1971), and in *Corporation of the Presiding Bishop v. Amos*, Nos. 86-179, 86-401, 483 U.S. ____, 107 S.Ct. 2862 (1987).

ARGUMENT

Summary of Argument

This case presents the question whether a party who is subject to a state licensing requirement from which other parties are statutorily exempt may challenge the exemption as an unconstitutional establishment of religion, absent any evidence of actual injury resulting from his different statutory treatment. Petitioners respectfully submit that the Court of Appeals' holding that respondents have standing to sue is an unjustified extension of the *Arkansas Writers' Project* decision to an entirely different factual situation, and one that requires correction to resolve an actual conflict among the several courts of appeals and to prevent improper extensions of standing to parties who have not suffered injury, in violation of Article III (part I). Petitioners further submit that this Court should review and reverse the Court of Appeals' ruling on the ground that plaintiffs' alleged economic injuries do not satisfy the prudential "zone of interests" test for standing to raise an Establisment Clause question (part II).

I. Constitutional grounds

The concept of standing is part of Article III's "fundamental" limitation of federal court jurisdiction to actual cases or controversies. *E.g., Simon v. Eastern Kentucky Welfare Rights Organization*, 426 U.S. 26, 37 (1976). "[A]t an irreducible minimum, Art. III requires the party who invokes the court's authority to 'show that he personally has suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendant.' " *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 472 (1982), quoting *Gladstone, Realtors v. Village of Bellwood*, 441 U.S. 91, 99 (1979). This limitation is especially important where plaintiffs ask a court to invalidate a legislative act. Rigorous application of the requirement of standing in this context furthers the important and longstanding federal policy of avoiding unnecessary constitutional adjudications, thus preventing acrimonious confrontations between federal courts and the States or other branches of the

federal government. *See, e.g., Valley Forge, supra*, 454 U.S. at 473-74; *Schlesinger v. Reservists Committee to Stop the War*, 418 U.S. 208, 221-22 (1974). If a federal court is asked to void a state statute, in short, it should be very certain that the party seeking relief is genuinely injured by the enactment at issue.

This Court (in at least four cases[4]) and numerous decisions of other courts of appeals[5] have held that allegations of standing, if denied, must be proved in a preliminary evidentiary hearing or at trial. The Court of Appeals' decision, relying on *Arkansas Writers' Project*, fails to address the core rationale of those decisions.

Arkansas Writers' Project involved a First Amendment challenge to "a state sales tax scheme that taxes general interest magazines, but exempts newspapers and religious, professional, trade, and sports journals." ___ U.S. at ___, 107 S.Ct. at 1724. The appellant, a publisher of a general interest magazine, sought a refund of sales taxes paid, relying on this Court's decision in *Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue*, 460 U.S. 575 (1983). The parties stipulated that the appellant had paid over $15,000 in sales taxes during the relevant period. ___ U.S. at ___, 107 S.Ct. at 1725. In this Court, the State challenged the appellant's standing on the ground that its injury would not be redressed by a decision in its favor. This Court rejected that argument, noting that numerous of its decisions have considered "claims that others similarly situated were exempt from the operation of a state law *adversely affecting the*

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[4] *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Foundation, Inc.*, No. 86-473, ___ U.S. ___, 108 S.Ct. 376, 385-86 (1987); *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 379 & n., 21 (1982); *Gladstone, Realtors v. Village of Bellwood*, 441 U.S. 99, 115 & n. 31 (1979); *United States v. SCRAP*, 412 U.S. 669, 689-90 (1973).

[5] *E.g., Hope, Inc. v. County of DuPage, Illinois*, 738 F.2d 797, 808 (7th Cir. 1984) (*en banc*); *Halkin v. Helms*, 690 F.2d 977, 999 (D.C. Cir. 1982); *Glover River Organization v. United States Dept. of Interior*, 675 F.2d 251, 254 & n. 3 (10th Cir. 1982); *Aiello v. City of Wilmington, Del.*, 623 F.2d 845, 856-58, 859 (summary) (3d Cir. 1980); *Legal Aid Society of Alameda Co. v. Brennan*, 608 F.2d 1319, 1332-33 & n. 26 (9th Cir. 1979), *cert. denied*, 447 U.S. 921 (1980); *NAACP, Boston Chapter v. Harris*, 607 F.2d 514, 526 (1st Cir. 1979); *Public Citizen v. Lockheed Aircraft Corp.*, 565 F.2d 708, 714 & n. 22 (D.C. Cir. 1977); *City of Hartford v. Towns of Glastonbury*, 561 F.2d 1032, 1051 (2d Cir. 1976) (*en banc*), *cert. denied*, 434 U.S. 1034 (1978).

claimant." *Id.* at ____, 107 S.Ct. at 1726 (emphasis added). It held that "appellant has alleged sufficient a personal stake in the outcome of this litigation. 'The holding of the [Arkansas] cour[t] stand[s] as a total bar to appellant's relief; [its] constitutional attack holds the only promise of escape from *the burden that derives from the challenged statut[e].*' " *Id.* at ____, 107 S.Ct. at 1726 (emphasis added), quoting *Orr v. Orr*, 440 U.S. 268, 273 (1979).

In *Arkansas Writers' Project*, the adverse effect or burden was stipulated. The appellant was *directly* impacted by the differing statutory treatment; it had paid over $15,000 in sales taxes that a similarly-situated professional or sports magazine had avoided. The issue in that case was whether the appellant lacked standing because a successful challenge might not relieve the conceded burden of taxation. ____ U.S. at ____, 107 S.Ct. at 1726; *see Orr v. Orr*, 440 U.S. at 271-73. In this case, petitioners have never stipulated that respondents are adversely affected by the different statutes applicable to their child care centers, and petitioners presented substantial evidence to the contrary at the trial. Unlike the appellant in *Arkansas Writers' Project*, respondents here rely on an entirely indirect alleged impact of the exemption. They have alleged but not proved that petitioners' licensure exemption allows them to operate at lower costs and to charge lower fees, and that respondents are thereby placed at a competitive disadvantage. That is a far cry from the substantial, direct impact of state taxation involved in the *Arkansas Writers' Project* case. Thus the issue here is whether the plaintiffs are adversely affected at all, not whether invalidation of the statute will remove a conceded adverse effect.

In short, respondents have established only that they are treated *differently* than petitioners. *No* evidence demonstrates that they are treated *less favorably*. Petitioners respectfully submit that the Court should grant this Cross-Petition to correct the Court of Appeals' unwarranted extension of the *Arkansas Writers' Project* decision, to prevent uncritical acceptance of federal judicial challenges to state statutes by parties unable to demonstrate any injury resulting from such statutes, and to resolve the conflict between the Fourth Circuit's decision in this case and numerous contrary rulings of this Court and other courts of appeals.

II. Prudential grounds

Beyond the requirements of Article III, this Court has developed a series of "prudential" limitations on standing. These include the requirement "that the plaintiff's complaint fall within 'the zone of interests to be protected or regulated by the statute or constitutional guarantee in question.' " *Valley Forge Christian College, supra*, 454 U.S. at 475, quoting *Association of Data Processing Service Orgs., Inc. v. Camp*, 397 U.S. 150, 153 (1970).

Plaintiffs' alleged economic injuries manifestly are not arguably within the "zone of interests to be protected or regulated by the . . . constitutional guarantee in question," the Establishment Clause of the First Amendment. That Clause was adopted to "ensur[e] governmental neutrality in matters of religion." *Gillette v. United States*, 401 U.S. 437, 449 (1971); *see also, e.g., Walz v. Tax Commission*, 397 U.S. 664, 669 (1970). Plaintiffs seek to avoid "competitive injury," not to promote religious neutrality or freedom. *Cf. McGowan v. Maryland*, 366 U.S. 420, 430-31 (1961) (persons prosecuted for violating Sunday closing law had standing to challenge law under Establishment Clause, under circumstances of "direct economic injury, allegedly due to the imposition on them of the tenets of the Christian religion").[6]

The Court of Appeals did not address petitioners' arguments with respect to the "zone of interests" standard. Petitioners respectfully submit that this Court should grant this Cross-Petition to consider application of that test to challenges to legislation based on the Establishment Clause.

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[6] Unlike the Sunday closing law in *McGowan*, the exemption statute here does not impose religious beliefs on anyone. Respondents have never alleged the contrary.

CONCLUSION

In that event that respondents' Petition for Certiorari is granted, the Court also should grant this Cross-Petition to consider whether respondents have standing to assert their constitutional challenge.

Respectfully submitted,

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